Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 78-63

RICKY MANN MOON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

RICKY MANN MOON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner Ricky Mann Moon respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered on April 11, 1978, which upheld petitioner's conviction for possession of marijuana with intent to distribute it.

OPINIONS BELOW

No opinions were issued by the courts below.

JURISDICTION

The decision of the Supreme Court of Virginia denying a Writ of Error and Supersedeas, thereby affirming appellants' judgment of conviction in the Westmoreland

County Circuit Court was entered on April 11, 1978. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether Virginia law, which provides penalties for possession of marijuana with intent to distribute it of five to forty years imprisonment, the same as those imposed for distribution of hard drugs like heroin, barbiturates and amphetamines, violates the due process and equal protection clauses of the Fourteenth Amendment.

2. Whether a warrantless search of the car Moon was driving and the additional warrantless search of a bag in the car found later to contain marijuana was permissible under the Fourth Amendment, where the search was not incident to an arrest and where the government introduced no evidence to suggest that exigent circumstances required a warrantless search.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of the Virginia Statutes listed below and set forth in the Appendix:

§18.2-248

§54-524.84:4

STATEMENT OF THE CASE

On August 7, 1976, Ricky Mann Moon, then age 19, and two companions drove into a hotel parking lot in Colonial Beach, Virginia, and parked the car they were driving, which was on loan from Moon's employer. Tr. 90, 143, 180.[1] Shortly thereafter, Officer R. D. Davis of the Westmoreland County Police pulled his squad car up behind them. The three occupants alighted from the car. Davis approached them and, though he possessed no search warrant, searched all three individuals for contraband drugs. Tr. 90. He found no drugs or weapons in their possession, and saw no drugs in plain view in the car. Tr. 145-46.

Davis released the two individuals accompanying Moon. Tr. 36. He then proceeded to search the borrowed car and found a brown grocery bag under the front

[1] References are to the trial transcript.

seat. He opened the bag, searched its contents, and found what was subsequently identified as several ounces of marijuana. Tr. 120-121. Davis arrested Moon and Moon was eventually indicted for the crime of possession of marijuana with intent to distribute it. Since marijuana is classified in Virginia as a Schedule I narcotic, Moon's offense was a felony carrying a minimum sentence of five years imprisonment and a maximum of forty years imprisonment, the same sentence as he would receive if the drug involved were heroin, amphetamines or another hard drug. Va. Code §18.2-248, 54-524.84:4. He was tried without a jury on April 12, 1977, in Westmoreland County Circuit Court, convicted and, on June 1, 1977, sentenced to ten years imprisonment, eight of which the court suspended.

Prior to his trial, Moon moved to dismiss the case on the ground that the imposition of identical penalties for possession with intent to distribute marijuana as are imposed for offenses involving far more dangerous drugs such as amphetamines and heroin, is arbitrary and irrational and hence a violation of his right to due process and to equal protection of the law. Tr. 7-76. He presented evidence that marijuana has none of the addictive or other harmful effects of hard drugs like heroin and morphine, and argued on the basis of these facts that it was utterly arbitrary for Virginia constitutionally to classify marijuana with these drugs for punishment purposes. The court denied his motion.

Moon also moved to suppress evidence used against him deriving from the warrantless search of the automobile he was driving because it violated his right under the Fourth Amendment to be free from unreasonable searches and seizures. Tr. 93-120. The Commonwealth introduced no evidence to suggest that exigent circumstances existed to justify the warrantless search and did not explain why the car containing the brown paper bag

was not impounded so that a warrant could be obtained. It also admitted that neither the search incident to arrest nor plain view doctrines applied to the search. The trial court nevertheless upheld the validity of the search, stating, "It looks to me like the law has gotten more liberal so far as searches are concerned, at least that's the way I interpret the recent Supreme Court decisions." Tr. 119-120.

On June 3, 1977, Moon timely noted an appeal of his conviction to the Supreme Court of Virginia pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia. He assigned as error, *inter alia,* the issues raised in this petition. On April 11, 1978, the Virginia Supreme Court affirmed Moon's conviction without opinion. A copy of the court's order is contained in the Appendix.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT, CURRENT, AND MUCH LITIGATED QUESTION OF WHETHER THE PUNISHMENT FOR OFFENSES INVOLVING MARIJUANA, A NON-ADDICTIVE DRUG, WITH ADDICTIVE DRUGS SUCH AS HEROIN IS ARBITRARY AND IRRATIONAL AND HENCE VIOLATIVE OF THE FOURTEENTH AMENDMENT.

A. The Classification of Marijuana With Hard Drugs For Punishment Purposes Is Utterly Irrational

Many years of research have shown that formerly held assumptions about the dangerousness of marijuana to be unfounded and the severe penalties for its illegal use and distribution have been altered in many jurisdictions. In particular, recognizing the vast differences between marijuana and drugs like heroin and amphetamines, states and the federal government have imposed lesser penalties for

possession of marijuana with intent to distribute it[2] than they do for equivalent offenses involving hard drugs. Other states, including Virginia, have resisted this change, and still classify marijuana for punishment purposes as a Schedule I drug, with drugs having such devastating harmful effects as morphine, heroin, and amphetamines, so that its possession with intent to distribute it (even, as here, such a small amount as eleven ounces) carries severe punishment, here a minimum of five to a maximum of forty years imprisonment. *See* Virginia Code §18.2-248 (punishment); §54-524.84:4 (schedule).[3] The number of marijuana prosecutions under this and other harsh but irrational statutes, involving so many instances of lengthy incarceration, warrants review of these punishment schemes.

While recognizing the power of the state to classify drugs and punish their illicit sales, the Constitution imposes limits on Virginia's power in requiring some rational basis for the classification, *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), which does not exist in this case. As the Supreme Court has explained:

> [W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).

[2] *See, e.g.*, 21 U.S.C. §841 (b); Ariz. Rev. Stat. §§36-1002 through 36-1002.07; Ill. Rev. Stat. Ch. 56½ §§704, 1401, 1402; Mass. Gen. Laws Ann. Ch. 94C §§31, 32, 34; Mo. Rev. Stat. §195.200; Tenn. Code Ann. §§54-1413, 1422, 1432; Tex. Penal Code Ann. tit 71, §§4.03-4.05.

[3] Other such statutes include Ala. Code Title 22 §258(47); Nev. Rev. Stat. §§453.321, 453.337, 453.336. W. Va. Code §1385(23).

A legislative declaration of fact, moreover, appearing reasonable when enacted, does not insulate the statute from judicial review. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

This Court has in the past had occasion to review drug classification schemes in the related context of statutory presumptions contained in 21 U.S.C. §176 that persons who possessed marijuana would be presumed to know the marijuana had been illegally imported. The Court held the presumptions invalid, for it was "based upon a legislative declaration of facts subject to attack on the ground that the facts no longer exist." *Leary v. United States*, 395 U.S. 6, 38 n. 68 (1969). In *Turner v. United States*, 396 U.S. 398 (1970), the Court performed similar analysis as to presumptions concerning cocaine and heroin.

The evidence presented in this case, when coupled with studies by scholars and researchers throughout the country, demonstrates overwhelmingly that no rational basis exists for the classification of marijuana as a Schedule I drug for all purposes, along with heroin and amphetamines. Dr. Dorothy Whipple testified in this case that marijuana is not addictive; that it does not produce tolerances; that it is much less dangerous than amphetamines or heroin; that there is not a single recorded incident of a death from an overdose of marijuana in a laboratory animal or in a human being, that it has

medical uses;[4] and that it has more benign physiological effects than alcohol or tobacco.

These conclusions have been confirmed by the most respected academic and governmental studies of the effects of marijuana. The National Commission on Marijuana and Drug Abuse, in its study, *Marijuana: A Signal of Misunderstanding* (1972) reported no significant physiological effects of marijuana, either long or short term, and found no evidence of addiction or high potential for abuse. The Commission further found that marijuana use is not associated with crime and that it did not lead to use of hard drugs. The same conclusions were reached by Dr. Lester Grinspoon, Professor of Medicine at Harvard University and the nation's most noted authority on the subject, in *Marijuana Reconsidered* (1971), by the more recent study by the Domestic Council Drug Abuse Task Force, *White Paper on Drug Abuse* (1975), and by the annual reports to Congress by the Department of Health, Education and Welfare, *Marijuana and Health* (1971-1976).

It is thus completely irrational to expose a person convicted of possession with intent to distribute marijuana to the same penalties as one who engages in similar activity with respect to heroin, morphine and other drugs.

The effects of that arbitrariness on individuals throughout the United States can hardly be underestimated. Hundreds, perhaps thousands of people, including young people like Moon, continue to be victims of a punishment

[4] Indeed, in litigation, the United States has recently agreed to permit medical use of marijuana for glaucoma by a private citizen for non-research purposes. *Randall v. United States*, No. 78-0817 (D.D.C., May 18, 1978).

scheme which has no relation to the seriousness of the crime committed or to offenses involving hard drugs. Because states like Virginia refuse to change their legislation is no excuse for the perpetuation of punishments so unfitting to the crime and repugnant to constitutional standards. Hence certiorari should be granted.

B. There Exists A Conflict Of Authority Concerning The Constitutionality of Punishing Marijuana Offenses As Harshly As Those Involving Hard Drugs.

At least two state courts have held that the punishment of marijuana offenses similarly with those involving hard drugs is completely irrational and hence a violation of federal constitutional guarantees of equal protection of the law. In *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972), the Michigan Supreme Court considered the sentence of nine and one half to ten years imposed on a person convicted of possession of marijuana. Although the majority found the sentence in violation of the cruel and unusual punishment clause of the constitution, the concurring opinions suggested that the categorization of marijuana with hard drugs was a denial of equal protection under the laws. In *People v. McCabe*, 49 Ill. 338, 275 N.E.2d 407 (1971), the defendant successfully challenged the existing Illinois statute, which provided a mandatory ten year minimum sentence for marijuana first offenders. The court held that marijuana was misclassified among addictive drugs. Other states, while upholding the *classification* of marijuana along with hard drugs, have expressly held that the classification was permissible only because lower *punishments* were imposed for marijuana offenses than for offenses involving hard drugs. *See, e.g., Hawaii v. Kantner*, 53 Haw. 371, 493 P.2d 306 (1972).

Other states, however, have upheld penalty schemes similar to Virginia's, refusing to distinguish marijuana from hard drugs for punishment purposes. *See, e.g., Tracey v. Janco,* 351 F.Supp. 836 (N.D. W. Va. 1972); *Sherman v. State,* 89 Nev. 77, 506 P.2d 417 (1973); *Boswell v. State,* 290 Ala. 349, 276 So.2d 592 (1973). This conflict in authority provides additional reason to grant the Writ.

II.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF THE PROPER APPLICATION OF *UNITED STATES v. CHADWICK* TO SEARCHES OF PACKAGES FOUND IN AUTOMOBILES.

The decision below in this case demonstrates a continuing refusal of state trial and appellate courts to abide by this Court's decisions concerning the permissible scope of warrantless searches of automobiles and their contents, even after *United States v. Chadwick,* 433 U.S. 1 (1977).

The automobile exception applies only in three types of situations. First, an automobile may be searched if there is actual danger that a vehicle containing contraband will be driven away. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Second, the exception applies where the vehicle is lawfully in police custody and, in order to protect the public or perform normal police functions, the vehicle must be inventoried. *South Dakota v. Opperman,* 428 U.S. 364 (1976); *Cady v. Dombrowski,* 413 U.S. 433 (1973); *Cooper v. California,* 386 U.S. 58 (1967). Finally, an automobile may be searched incident or subsequent to an arrest under circumstances which would permit any other search incident to an arrest. *Texas v. White,* 423 U.S. 67 (1975); *Chambers v. Maroney,* 399 U.S. 42 (1970).

Virginia has never claimed that petitioner's automobile was the subject of an inventory search and, as already stated, this is not a case of a search incident to arrest. The only remaining possible exception is that exigent circumstances existed which compelled the arresting officer to act quickly in order to prevent escape. But there is no evidence in this case that petitioner was about to flee or that the arresting officer believed he was about to flee.

Yet the trial and appellate courts have refused to abide by these decisions, thereby warranting review here. Furthermore, the Virginia Supreme Court ignored the constraints on searches of automobile contents imposed by *United States v. Chadwick,* 433 U.S. 1 (1977). In *Chadwick,* this Court invalidated the warrantless search of a locked two hundred pound trunk of marijuana found in an automobile, even though a search of the car itself might have been proper. Rather, the Court held that the proper procedure was to have seized the trunk and obtained a warrant for its search. The rationale for this ruling was that there is a significant expectation of privacy surrounding closed containers which mandates the protection of a judicial warrant before a search. The countervailing governmental interests of preventing the removal or destruction of the evidence in a container, and in protecting against the use of any concealed weapons, were held to be satisfied by seizure of the container.

Thus, under *Chadwick,* a warrantless search of a closed container found in a stationary automobile, once the container is safely seized, cannot be legitimated either by the automobile exception to the warrant rule, based on the danger of flight, or by the search incident to arrest exception to the warrant rule, based on the possibility of the use of force to prevent arrest. *See United States v. Moore,* 562 F.2d 106 (1st Cir. 1977).

Here, the closed bag which was under the arresting officer's control and which was not within the area of petitioner's control, should have been seized and a warrant obtained for its search.

In addition to righting the injustice done to petitioner, granting the writ in this case would provide clarification for state courts on the proper application of *Chadwick* to automobile searches, which occur with such regularity. This clarification is especially important since under *Stone v. Powell,* 428 U.S. 465 (1976), federal habeas corpus procedure is not available to a state prisoner to challenge the constitutionality of a search, evidence from which was used at his trial, if he has fully litigated his claim in state court. Furthermore, review by certiorari here is his only opportunity for federal review of Moon's Fourth Amendment claims, claims summarily dealt with by both the trial court and the Virginia Supreme Court. *See Mincey v. Arizona,* 46 U.S.L.W. 4737 (June 21, 1978) (Marshall, J., concurring). The unavailability of any other federal review provides an additional reason to grant the Writ.

CONCLUSION

For the foregoing reasons, petitioner urges that this Court issue a Petition for Certiorari to review the decision below.

Respectfully submitted,

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July, 1978

APPENDIX

APPENDIX

§ 18.2-248. Penalties for manufacture, sale, gift, distribution or possession of a controlled drug.—Except as authorized in The Drug Control Act, chapter 15.1 (§ 54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.

(a) Any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars; . . .

§ 54-524.84:4. Schedule I.—(a) The controlled substances listed in this section are included in Schedule I.

(b) Any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetylmethadol;
(2) Allylprodine;
(3) Alphacetylmethadol;
(4) Alphameprodine;
(5) Alphamethadol;
(6) Benzethidine;
(7) Betacetylmethadol;
(8) Betameprodine;
(9) Betamethadol;
(10) Betaprodine;
(11) Clonitazene;
(12) Dextromoramide;
(13) [Repealed.]

(14) Diampromide;
(15) Diethylthiambutene;
(15a) Difenoxin;
(16) Dimenoxadol;
(17) Dimepheptanol;
(18) Dimethylthiambutene;
(19) Dioxaphetylbutyrate;
(20) Dipipanone;
(21) Ethylmethylthiambutene;
(22) Etonitazene;
(23) Etoxeridine;
(24) Furethidine;
(25) Hydroxypethidine;
(26) Ketobemidone;
(27) Levomoramide;
(28) Levophenacylmorphan;
(29) Morpheridine;
(30) Noracymethadol;
(31) Norlevorphanol;
(32) Normethadone;
(33) Norpipanone;
(34) Phenadoxone;
(35) Phenampromide;
(36) Phenomorphan;
(37) Phenoperidine;
(38) Piritramide;
(39) Proheptazine;
(40) Properidine;
(40a) Propiram;
(41) Racemoramide;
(42) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically

excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;
(2) Acetyldihydrocodeine;
(3) Benzylmorphine;
(4) Codeine methylbromide;
(5) Codeine-N-Oxide;
(6) Cyprenorphine;
(7) Desomorphine;
(8) Dihydromorphine;
(8a) Drotebanal;
(9) Etorphine;
(10) Heroin;
(11) Hydromorphinol;
(12) Methyldesorphine;
(13) Methyldihydromorphine;
(14) Morphine Methylbromide;
(15) Morphine Methylsulfonate;
(16) Morphine-N-Oxide;
(17) Myrophine;
(18) Nicocodeine;
(19) Nicomorphine;
(20) Normorphine;
(21) Phoclodine;
(22) Thebacon.

(d) *Hallucinogenic substances.*—Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of its salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the

specific chemical designation (for purposes of this paragraph only, the term "isomer" includes the optical, position, and geometric isomers):

(1) 3,4-methylenedioxy amphetamine;
(2) 5-methoxy-3,4-methylenedioxy amphetamine;
(3) 3,4,5-trimethoxy amphetamine;
(4) Bufotenine;
(5) Diethyltryptamine;
(6) Dimethyltryptamine;
(7) 4-methly-2,5-dimethoxyamphetamine;
(8) Ibogaine;
(9) Lysergic acid diethylamide;
(10) Marijuana;
(11) Mescaline;
(12) Peyote;
(13) N-ethyl-3-piperidyl benzilate;
(14) N-methyl-3-piperidyl benzilate;
(15) Psilocybin;
(16) Psilocyn;
(17) Tetrahydrocannabinols;
(18) Hashish oil (Some trade or other names: hash oil; liquid marijuana; liquid hashish);
(19) 2,5-dimethoxyamphetamine (Some trade or other names: 2,5-dimethoxy-a-methylphenethylamine; 2,5-DMA);
(20) 4-bromo-2,5-dimethoxyamphetamine (Some trade or other names: 4-bromo-2,5-dimethoxyamethylphenethylamine; 4-bromo-2,5-DMA);
(21) 4-methoxyamphetamine (Some trade or other names: 4-methoxy-a-methylphenethylamine; paramethoxyamphetamine; PMA) (1972, c. 798; 1973, c. 479; 1976, c. 614; 1977, c. 302.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 11th *day of*

Ricky Mann Moon, Appellant,

against Record No. 771223
Circuit Court No. 7

Commonwealth of Virginia, Appellee.

From the Circuit Court of Westmoreland County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: /s/ Richard R. Bruish
Deputy Clerk

Supreme Court, U. S.
FILED
OCT 20 1978
MICHAEL RODAK, JR., CLERK

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PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 24(5) of the Rules of this Court, petitioner Ricky Mann Moon submits this supplemental brief to bring to the Court's attention the fact that it has recently granted a Petition for a Writ of Certiorari in a case involving a question identical to the one presented by petitioner here.

The second of the questions presented to this Court in Moon's Petition for a Writ of Certiorari is:

> Whether a warrantless search of the car Moon was driving and the additional warrantless search of a

bag in the car found later to contain marijuana was permissible under the Fourth Amendment, where the search was not incident to an arrest and where the government introduced no evidence to suggest that exigent circumstances required a warrantless search.

On October 10, 1978, this Court granted a Petition for a Writ of Certiorari in *Arkansas v. Sanders*, No. 77-1497, 47 U.S.L.W. 3239, 3246. The question presented by that case is whether the existence of probable cause justifies the warrantless search of a suitcase found in the trunk of a car. The resolution of each case depends on the degree to which probable cause alone permits a search of closed containers police officers find in automobiles, where it would be possible to immobilize the containers and obtain a warrant to search them. The issues in the two cases are so closely linked that a decision in one case is almost certain to dispose of the other. Petitioner therefore suggests that, in light of the substantial identity of the issues presented in *Arkansas v. Sanders* and this case, it would be appropriate for the Court to grant Moon's Petition

A grant of certiorari is preferable to a deferral of this petition until a decision in *Arkansas v. Sanders.* It would give the Court an opportunity to resolve the important

question before it in an additional factual context and thus give greater clarity to an area of the law which has been uncertain and difficult to apply.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1978

No. 78-63

RICKY MANN MOON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent respectfully prays that a Writ of Certiorari to review the judgment of the Supreme Court of Virginia entered on April 11, 1978, which upheld petitioner's conviction for possession of marijuana with intent to distribute, not be granted.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia was an unreported memorandum opinion which is set out in full at page 5a of the Appendix to the Petition for a Writ of Certiorari.

STATEMENT OF FACTS

On July 30, 1976, Deputy R. D. Davis of the Westmoreland County Sheriff's Office was approached by a reliable informant and advised that petitioner possessed 2 pounds of marijuana and 100 hits of speed and amphetamines. (Tr. at 83, 85). Deputy Davis searched the Colonial Beach area for petitioner, but was unable to find him. (Tr. at 85). On July 31, 1976, Deputy Davis was approached by a second confidential informant and advised that petitioner had asked the second informant whether he knew of anyone who wanted to buy a few ounces of marijuana, because petitioner had plenty of marijuana to sell. (Tr. at 86, 87). Then, Deputy Davis searched the second informant and gave him money to purchase marijuana from petitioner. (Tr. at 87). Approximately 50 minutes later, Deputy Davis received from the second informant a bag of plant material that field tested as marijuana. (Tr. at 87). The second informant also told Deputy Davis that petitioner said he'd sold over 300 pounds of marijuana and 1,000 hits of speed that weekend and that he was supposed to receive a shipment of "Columbian" that week and would return to Colonial Beach with it the next weekend. (Tr. at 87). On August 7, 1976, about 10:30 p.m., Deputy Davis met with a third reliable informant who stated that he had just purchased a baggie of marijuana from petitioner and that he had observed a medium amount of marijuana under the front seat in petitioner's car. (Tr. at 89). The informant described petitioner's car and told Deputy Davis that the car was parked in front of the Colonial Beach Hotel (Tr. at 90). Deputy Davis went to the Colonial Beach Hotel to check for the car, but it was not there. (Tr. at 90). At 11:10 p.m. the same night, while cruising near the Reno Hotel, Deputy Davis was stopped by the second informant

and advised that petitioner was in front of the Reno Hotel. (Tr. at 90). Deputy Davis then checked in front of the Reno Hotel for petitioner, but he was not there. (Tr. at 90). At 11:25 p.m. Deputy Davis picked up the third informant, and while they were cruising Colonial Avenue the informant spotted petitioner's car turning into the Colonial Beach Hotel. (Tr. at 90). Deputy Davis let the informant out and immediately pulled his car up behind petitioner's car. (Tr. at 90). When Deputy Davis pulled behind the car, two persons alighted from the passenger's side and petitioner got out of the driver's side. (Tr. at 90). Deputy Davis searched the two passengers and let them go. (Tr. at 90, 91). He then searched the petitioner and the petitioner's car. (Tr. at 91). Underneath the driver's side front seat, Deputy Davis found a brown paper grocery bag that contained, among other things, 11 clear plastic baggies filled with marijuana. (Tr. at 120, 121). Under the passenger's side front seat, Deputy Davis also found a wooden and metal pipe with a residue of marijuana, and a plastic baggie of marijuana. (Tr. at 121).

Prior to petitioner's trial for possession with intent to distribute, petitioner moved to dismiss the case on the ground that §§ 18.2-248 and 54-524.84:4 of the Code of Virginia (1950), as amended, violated equal protection and due process of the law because they arbitrarily and irrationally classified marijuana as a Schedule I drug. At a hearing on this question, petitioner presented the testimony of an expert witness, Dr. Dorothy V. Whipple. (Tr. at 8, 19). On cross-examination, Dr. Whipple testified that while she did not feel that marijuana should be classified as a Schedule I drug, other people "with all sorts of credentials" had conducted studies which concluded that long term marijuana use had the following physiological effects: brain damage;

damage to cellular structure; reduction of the sperm count and testoserone levels; sinusitis; pharyngitis; bronchitis; emphysema; and chomosome breakage. (Tr. at 47-50). Dr. Whipple also testified that she would strongly urge that pregnant women not use marijuana. (Tr. at 54).

JURISDICTION

Petitioner asserts that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Do §§ 18.2-248 and 54-524.84:4 of the Code of Virginia (1950), as amended, violate equal protection and due process of the law because they classify marijuana as a Schedule I drug?

2. Was the warrantless search of petitioner's car unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case are fully set out in the Petition for a Writ of Certiorari previously filed with this Court.

STATEMENT OF THE CASE

Petitioner was indicted by a grand jury of Westmoreland County, Virginia, for possession with intent to distribute marijuana. Petitioner was tried without a jury on April 12, 1977, in Westmoreland County Circuit Court, convicted and, on June 1, 1977, sentenced to ten years imprisonment, eight of which the Court suspended.

On June 3, 1977, petitioner noted an appeal of his conviction to the Supreme Court of Virginia. He assigned as error, among others, the issues raised in this petition. On April 11, 1978, the Supreme Court of Virginia affirmed petitioner's conviction without an opinion.

ARGUMENT

I.

Sections 18.2-248 and 54-524.84:4 Of The Code Of Virginia (1950), As Amended, Do Not Violate Equal Protection And Due Process Of The Law Because They Classify Marijuana As A Schedule I Drug.

Petitioner argues that recent research has indicated that marijuana is not a dangerous drug. Accordingly, petitioner claims that it is utterly irrational to classify marijuana with more harmful drugs like morphine, heroin and amphetamines. Petitioner asserts that three cases have held that it is irrational to classify marijuana with drugs like heroin, and that it would be appropriate for the Court to grant the Writ in this case to resolve the alleged conflict created by these rulings.

Petitioner's argument overlooks the fact, however, that there is an overwhelming weight of authority that it does not violate equal protection or due process of the law to classify marijuana in the same schedule as narcotics or other allegedly more harmful drugs. 50 A.L.R.3d 1164; *Rener* v. *Beto,* 447 F.2d 20 (5th Cir. 1971), *cert. den.,* 405 U.S. 1051 (1972); *English* v. *Virginia Probation and Parole Board,* 481 F.2d 188 (4th Cir. 1973); *United States* v. *Kiffer,* 477 F.2d 349 (2nd Cir. 1973), *cert. den.,* 414 U.S. 831 (1973); *United States* v. *Rodriquez-Camacho,* 468 F.2d 1220 (9th Cir. 1972), *cert. den.,* 410 U.S. 985 (1973); *State* v. *Rao,* 370 A.2d 1310, 171 Conn. 600 (1976); *State* v. *Strong,* 245 N.W.2d 277 (S.D. 1976). These cases recognize the well

established principle that where the legislative judgment is drawn in question, the court's inquiry must be restricted to the issue whether any state of facts, either known or which could reasonably be assumed, affords support for the legislative judgment. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 82 L.Ed. 1234, 58 S.Ct. 778 (1938). These decisions also recognize that a legislature is free to adopt any classification it deems appropriate to promote the general welfare so long as the classification bears a reasonable relation to a proper legislative purpose. *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961).

While a number of medical experts have concluded that marijuana use is not particularly harmful, there is still a substantial body of medical experts who believe that long term marijuana use can have severe physiological and psychological effects on an individual. *See Hearings on the Marijuana-Hashish Epidemic and Its Impact on United States Security Before the Subcommittee to Investigate the Administration of the Internal Security Laws of the Senate Committee on the Judiciary*, 93rd Congress, 2nd Session (1974). Indeed, petitioner's own medical expert, Dr. Dorothy V. Whipple, acknowledged that other medical experts have concluded that long term marijuana use has the following physiological effects: brain damage; damage to cellular structure; reduction of the sperm count and testosterone levels; sinusitis; pharyngitis, bronchitis; emphysema; and chromosome breakage. (Tr. at 47-50). Accordingly, the courts which have considered the question have with virtual unanimity held that because there is a substantial conflict in the medical community as to the real consequences of long term marijuana use, legislatures have not acted irrationally in classifying marijuana with narcotics and other physically harmful drugs. *See United States* v. *Kiffer, supra* at 353,

Rener v. *Beto, supra* at 22 & 23, and *State* v. *Strong, supra* at 280. Respondent contends, therefore, that it would be inappropriate for the Court to substitute its judgment for that of the Virginia General Assembly when there is still an unresolved conflict as to the effects of marijuana use.

Petitioner also argues that there is a split of authority as to whether it is irrational to classify marijuana as a Schedule I drug, and urges the Court to grant the Writ to resolve this issue. In support of his argument he cites *People* v. *McCabe*, 275 N.E.2d 407, 49 Ill.2d 338 (1971); *People* v. *Sinclair*, 194 N.W.2d 878, 387 Mich. 91 (1972); and *State* v. *Kantner*, 493 P.2d 306 (Haw. 1972), *cert. den.*, 409 U.S. 948 (1972).

In *People* v. *McCabe* the Supreme Court of Illinois held that it violated equal protection to classify marijuana under the Narcotic Drug Act, with drugs such as heroin and morphine, rather than under the Drug Abuse Control Act, which included barbituates, amphetamines and hallucinogens. *People* v. *McCabe* is certainly distinguishable from the situation presented by Virginia's statutes, because § 54-524.84:4 includes not only marijuana, heroin and morphine in Schedule I, but also amphetamines, barbituates and hallucinogens. Chief Justice Underwood's dissent in *McCabe* noted that the defendant in that case conceded that it might not be irrational to classify marijuana with "hard drugs" if there was only one classification. *People* v. *McCabe, supra* at 415. Rather, defendant's complaint, and the Court's holding, was that it was irrational to classify marijuana with heroin and morphine instead of with hallucinogens, which it more closely resembled. *People* v. *McCabe, supra* at 415. In reality, therefore, *McCabe* is not authority for the proposition that it is irrational to classify marijuana in a schedule with hallucinogens, as well as with heroin and morphine.

People v. *Sinclair, supra,* contained many opinions which for various reasons struck down Michigan's statute penalizing the "possession" of marijuana. Even the opinions which held that the statute's classification of marijuana violated equal protection, however, held that the statutory classification violated equal protection because it classified marijuana with hard drugs such as opiates, rather than with other hallucinogens. *People* v. *Sinclair, supra* at 894. Moreover, the Court's decision in *Sinclair* was influenced by the fact that they were concerned with a case of mere "possession" and not a case which had elements of distribution such as a charge for possession with intent to distribute. *People* v. *Sinclair, supra* at 896. Accordingly, respondent contends that there is no conflict between *People* v. *Sinclair* and the Virginia statutes cited by petitioner.

In *State* v. *Kantner, supra,* the Supreme Court of Hawaii held that in a "possession" case it did not violate equal protection to classify marijuana with narcotics where substantially lower penalties were provided for possession of marijuana than were provided for possession of narcotics. Petitioner argues from this that since Virginia's statutes do not provide lower penalties for possession of marijuana with intent to distribute than they do for possession of drugs like heroin and amphetamines with intent to distribute, they are irrational. Petitioner's argument ignores the fact, however, that Hawaii provided identical penalties for distribution of marijuana and for distribution of narcotics. *State* v. *Kantner, supra* at 309. Indeed, the Supreme Court of Hawaii stated that while the distribution offenses were not before them, they doubted that it was irrational for the legislature to have treated distribution of marijuana and distribution of narcotics the same. *State* v. *Kantner, supra* at 309. Respondent submits, therefore, that *Kantner* is not in conflict with the Virginia statutes cited by petitioner.

Finally, respondent would point out that petitioner was charged with possession of marijuana with intent to distribute, and not mere possession of marijuana. Respondent submits that the fact that this was a distribution related offense is an added element which justified the Virginia General Assembly's classification of marijuana with drugs such as heroin and morphine, as well as with other hallucinogens. *See United States* v. *Kiffer, supra* at 353. Furthermore, respondent would also note that while the maximum penalty for possession with intent to distribute was 40 years imprisonment, petitioner was in fact only sentenced to 2 years actual imprisonment. Accordingly, respondent alleges that petitioner was treated very fairly by the courts below, and that review is not necessary to correct a hardship imposed.

ARGUMENT

II.

The Warrantless Search Of Petitioner's Car Was Not Unreasonable.

Petitioner argues that the search of his car was unreasonable under *United States* v. *Chadwick,* 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977). His argument is that whether or not it was proper for Deputy Davis to search his car, under *Chadwick,* Deputy Davis should have obtained a warrant to search the paper bag in which the marijuana was found.

Respondent contends, however, that *Chadwick* is not controlling on the question of whether Deputy Davis' search was reasonable. In *Chadwick* the relationship between the footlocker and the automobile was merely coincidental. The government did not try to justify the search under the automobile exception, but, rather, tried to extend the automobile

exception to other objects, such as footlockers, which were potentially mobile. *United States* v. *Finnegan,* 568 F.2d 637 (9th Cir. 1977); *United States* v. *Young,* 567 F.2d 799 (8th Cir. 1977), *cert. den.,* 434 U.S. 1079 (1978). The Court rejected the government's argument and held that the automobile exception should not be extended to objects such as footlockers, because a person does not have the lessened expectation of privacy in a locked footlocker that he has in an automobile. *United States* v. *Chadwick, supra* at 12. The Court also held that there were no exigent circumstances requiring a search of the footlocker because the locker had been safely transferred to the Boston Federal Building. *United States* v. *Chadwick, supra* at 13.

Respondent contends that circumstances were dramatically different in petitioner's case than they were in *Chadwick*. In petitioner's case the relationship of the paper bag and the auto was not merely coincidental. Deputy Davis had received information that marijuana was concealed and being transported in petitioner's car.

Further, there were exigent circumstances in petitioner's case. Deputy Davis had been searching for petitioner on and off for at least a week and had been unable to locate him. If the deputy had not stopped petitioner at the time that he did, and had gone to get a warrant instead, there was a very real possibility that he might have lost petitioner again and that the marijuana would have been disposed of before it could be seized. Moreover, while there is an expectation of privacy in a locked footlocker, there is nothing like that in a paper grocery bag.

Accordingly, respondent asserts that the principles controlling this case are found in decisions of this Court other than *Chadwick*. A long line of cases culminating in *Chambers* v. *Maroney,* 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975

(1970), *reh. den.* 400 U.S. 856, 27 L.Ed.2d 94, 91 S.Ct. 23 (1970), indicate that a search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway. Significantly, the Court there specifically rejected the argument implicitly made by petitioner; that there were no exigent circumstances because the car could have been seized and immobilized until a search warrant was obtained. While recognizing that it might be argued that seizure and immobilization was a lesser intrusion than an immediate search, the Court ruled that for constitutional purposes, there is no difference between seizing and holding a car before presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. *Id.* at 51, 52. Given probable cause to search, either course is reasonable under the Fourth Amendment. *Id.* at 52.

Accordingly, respondent asserts that because of the exigent circumstances in the present case, the search of the contents of the automobile, including the paper bag, was reasonable.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Deputy Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and I have mailed three copies of this Brief for Respondent in Opposition to Grant of Certiorari to Leonard S. Rubenstein, 108 North Columbus Street, Post Office Box 1226, Alexandria, Virginia 22313 on or before October 11, 1978.

JAMES E. KULP
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